A Constitutionally Momentous Judgment That Changes Practically Nothing?

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The Supreme Court's judgment in *Cherry/Miller (No 2)* that the prorogation of Parliament was unlawful, null and of no effect was a bold move as a matter of public law. It represents a constitutional court willing to assert its authority as guardian of the constitution. On its face, it bolsters the principle of parliamentary sovereignty with a principle of parliamentary accountability and responsible government, and apparently strengthens Parliament in relation to the Executive by ensuring these principles are not deprived of effect. The court extends justiciability and the rule of law into the murky waters of prerogative powers, refreshing parts of the UK Constitution other Courts couldn't reach. It was able to do all this in the absence of a codified constitution, drawing on foundational principle and an eclectic selection of precedent reaching back into constitutional prehistory. Although undoubtedly bold, and novel in major respects, the judgment is in keeping with the trend of the past decades, across many jurisdictions, towards an expanding role for the judiciary in policing constitutional boundaries. By inserting a requirement of 'reasonable justification' on the exercise of executive powers which frustrate Parliament's constitutional functions, the court did so here in a manner that will keep public lawyers busy for years to come.

But although potentially of long-term constitutional moment, it changes very little with regard to the fundamental constitutional and political issue of Britain's membership of the European Union, however much that issue loomed large in the background, and, given the cast of characters involved, also in the foreground of this dispute. If more constitutionally ground-breaking than *Miller (No 1)*, its practical impact on the Brexit process may prove to be as minimal.

So while the judgment bolsters Parliament's position on paper, the actual Parliament positioned in Westminster appears less capable of using its authority in a meaningful way. Sure, some more embarrassing defeats may be visited on a humbled Prime Minister, but this is not the kind of challenge that unsettles Johnson. If anything it confirms the worldview he wishes to project – utterly misleading though it is – of representing the people against the elite, or the establishment. What better way to do so than have arraigned against him a row of Supreme Court Justices? Parliament itself, across Government and Opposition and, significantly, within the Opposition, is hopelessly divided, not only on the question of Brexit but on whether to pursue its political goal first and foremost through an election or alternatively a second referendum (or, in one fairy-tale world, of revocation without a second referendum). The brashness of parliamentary outrage is matched only by the meekness of parliamentary action, apparently unable to stomach a withdrawal agreement, a no-deal Brexit, or a motion of no confidence. There is an argument that this is a form of

strategic delay, and that Johnson should be left to make more and more of his own mistakes and be backed into a corner, not least due to the Benn-Burt Act that obliges the Prime Minister to seek an extension that he has said he would never do. But this is a gamble that fails as a matter of political principle: if Johnson is unfit to govern then there should be an immediate vote of no confidence in him.

The Supreme Court's judgment accentuates the principle of parliamentary sovereignty and of parliamentary accountability of the executive, but what of Parliament's accountability to the people and the principle of popular sovereignty? These may not be explicitly recognised in the judgment, or in the black-letter law of the constitution, but they underwrite any modern constitutional order. The Court implicitly recognises as much when it proclaims that the 'House of Commons exists because the people have elected its members' (paragraph 55). Further, when considering the principle of responsible government in exceptional circumstances such as those posed by Brexit, in view of the 'fundamental change that was (sic) due to take place on 31st October 2019', the Court makes clear that it holds no view on whether this change is a good or bad thing, and adds, 'The people have decided that' (paragraph 57). This reinforces its statement earlier in the judgment, that, although 'technically, not legally binding', the referendum of 2016 has since been treated as 'politically and democratically binding' (paragraph 7).

Yet the Government's own position was fatally weakened by offering 'no reason – let alone a good reason' for the prorogation of Parliament (paragraph 61), a course perhaps less of 'high policy' than of high arrogance. A focus on this enabled the court to evade detailed consideration of the second limb of the test on the limits of prorogation (laid out in paragraph 50), of whether Parliament was truly frustrated in its constitutional operations in a sufficiently serious manner, a point which surely required more substantiation given its ability to pass legislation and conduct other business in the period prior to prorogation. The court appears here essentially to turn over the burden of justification for a *de facto* unusual prorogation onto the Government, but it then also evaded the question of whether any governmental motive was improper as a matter of law. Since, according to the Court, no reason was given, it would have been difficult to ascertain its propriety. But this also meant an evasion on a technical but crucial point (paragraph 30): could the Queen have *refused* the advice, on the basis of its impropriety, unsoundness, or on any other grounds? How would the Court have ruled had the Government been more forthright in its advice to the Queen and said it needed to prorogue to get on with the business of negotiating the Brexit that the people had decided on? We will never know. But the underlying irony may well be that many of those supporting the Court's rhetoric of representative democracy are in practice instrumentalising the judgment in the far more questionably democratic cause of Remaining in the European Union.

Any unorthodox judgment of this type and significance naturally raises questions about the appropriate limits of the power of unelected judges. This is a concern for those across the political spectrum, although, particularly in the US, debate is often centred on a conservative constitutionalism that abhors judicial activism in favour of a strong executive branch. But as a constitutional innovation read in the abstract, outside the Brexit politics in which it is embedded, there is no reason why the

judgment should not be broadly welcomed, even by those who favour more radical, democratic or socialist politics. Marxist historian EP Thompson went too far when he claimed that the rule of law is an ‘unqualified human good’, but there is a germ of truth in his belief that law can, among other things, be valuable in channelling and restraining the exercise of power. Of course there is no judicial road to socialism, and indeed, the courts may on occasion erect obstacles thereon, but there may be an executive road to authoritarianism that the courts can play a role, small though it is, in obstructing. There is no reason to lament this and some reason to consider its merits. But there is every reason for those who value radical, democratic or socialist politics, to consider whether these things can really best be pursued within the EU. There is a strong case that they cannot. Whatever one’s views on that question, the fact of having voted to leave the EU in a referendum changes the balance of the argument. That vote in 2016 did signal a momentous constitutional change, albeit one that is yet to be acted upon.
